

RETRIBUTION REFORMED: A FUTURE FOR REPARATION

On the need for principled reorientation in the administration of criminal justice for victims

Hendrik Kaptein (for proceedings of the Opole Conference on victims of crime etc., May 2008)

1. *Civilizing criminal law for victims*

Contemporary criminal law and criminal procedure are more or less patchwork-like, more or less inspired by not always easily compatible principles and goals of prevention, resocialization, social control, retribution and even respect for victims. The importance of victims' rights and interests is widely recognized recently. International rulings as issued by the United Nations and the European Union stress victims' rights. Serious attempts are being made to legally institutionalize care for victims in many contemporary legal orders. ('Victim' may be replaced by 'injured party' in case this last expression is felt to be more neutral. Here 'victim' will be generally used.)

Patchworks of criminal law and criminal procedure may accommodate a fair amount of such care, still victims' rights and interests may seem to compete with other implicit principles and goals. For example: compensation for victims by offenders seems no substitute for retribution. Even if offenders are made to pay for victims' harm, such payment may not constitute offenders' suffering regarded as essential for retribution. Also, such compensation seems to be unable to lead to any preventive effect by itself, as potential offenders may well regard payment as an acceptable price for crime.

Still, the main thesis to be defended here is that victims should not only receive their dues but also, more generally, that criminal law and punishment may be justified only in terms of compensation by offenders for harm done to individual victims and to the general interest, enforced by the state. It is only in terms of compensation for victims that offenders' suffering may be justified. Such compensation may rightly be called retribution in its original sense, as of course a core meaning of '*retribuere*' is: 'to restore'.

Such retribution is to consist of material and symbolical reparation by offenders of harm done to victims. Such a conception may be called civilized criminal law in at least two respects. First, civil rights of victims to retribution as restitution are central. Second, such retribution may be more civilized than actual criminal law and punishment are. In civilized criminal law, punishment is no longer regarded as infliction of suffering in the first place, be it for preventive, retributive or other reasons. Reparation or compensation by offenders for victims may still lead to suffering by offenders, as they may be forced to penal servitude or other service on behalf of victims. But such suffering is a by-product, probably satisfying victims to some extent but not essential for punishment as reparative retribution.

This shift from offenders' suffering to reparation leading to suffering as a by-product rather than a primary goal may indeed answer objections to proposals for replacement of punishment by compensation measures. Offenders' suffering as

essential for retribution and prevention is not lost when retribution is understood as being restitution in the first place. Punishment by offenders' material and symbolical restitution indeed goes much further than imposition of damages under tort law.

Reform of criminal law and punishment along these lines is not to be expected in any near future. Still, articulation of the foundations of criminal law and punishment in terms of retribution for victims may lead to rearrangement of criminal law patchworks on behalf of victims.

Outlines of this are to be explained here along the following lines. In § 2, strengths and weaknesses of current theories of meaning and function of criminal law and punishment are briefly discussed, both in their "apologetic" role with regard to actual criminal law and punishment and in their possibly reformatory roles. Civilized criminal law incorporates strong points in both preventive and retributive conceptions. Mediation approaches concerning victims and offenders are not incompatible with civilized criminal law either.

Fundamental for civilized criminal law and punishment is psychology of victims and offenders. The importance of such psychology is not always recognized in discussion of principles of criminal law and punishment. Relationships of resentment, reparation and self-respect are essential here (§ 3). Realization of this implies victims being the central *dramatis personae* of civilized criminal law, leading to punishment ranging from simple payment of damages to life terms of penal servitude (§ 4). Advantages of civilized criminal law include that offenders are not just to suffer. They are to contribute constructively to rectification, enabling them to gain self-respect by contributing constructively to civilized society (§ 5). How can resentment, reparation and respect as belonging to personal relationships be constitutive for essentially anonymous criminal law as enforced by the state? Predominant among other objections is the "price list" problem (§ 6). Suitably reinterpreted, current criminal law and civil law offer real possibilities for piecemeal improvement (§ 7).

2. Problems in current conceptions

"How, if at all, can we morally justify the terrible things we do to people as punishment (kill them or lock them up in cages)?" (Murphy, 1992; p. 689). Even apart from capital punishment, this unexpectedly non-institutional way of stating things reveals the pressing character of the question. Consequences of current criminal law, even in highly developed and seemingly humanly acceptable legal orders, are not just confined to caging and worse. Even short prison sentences lead to lifelong suffering. Consequently, there ought to be really convincing considerations justifying imprisonment as the standard punishment for serious offences.

However, common attempts to justify some form of punishment in terms of prevention and/or retribution and their many varieties, ranging from resocialization to retribution as pure suffering for offenders, are not necessarily apologetic with respect to actual practice. Indeed, such attempts may well be highly critical of actual practice and thus be reformatory in nature. But even in such roles, well-known and long-standing criticisms against conceptions of prevention and/or retribution do not

seem to be adequately answerable (see Ten, 1989 among others).

In preventive conceptions, realization of individual and/or general prevention may lead to instrumental use and concomitant unjust treatment of offenders and citizens in general. Also, preventive theories of criminal law and punishment should not assume a false air of social engineering. Criminal law and punishment cannot by themselves ban crime. Which is of course not to imply that prevention of crime is of no importance. Thus threats of punishment may have important ordering functions, for example in traffic law. In such applications of criminal law, prevention has pride of place. But in prevention of crimes like murder, manslaughter and burglary, means other than criminal procedure and punishment seem more apposite, like better protection against crime, better education and, of course, more social justice.

Plausible parts of preventive conceptions play roles in civilized criminal law too. In as far as penal servitude and other forms of compensation and reparation for victims are no attractive prospects for potential offenders, special and general prevention are welcome by-products of civilized punishment. In extreme cases, even civilized criminal law may prescribe imprisonment if it is the only measure of special prevention effective against dangerous offenders (§ 4).

However, criminal law and punishment are to be regarded mainly as offering answers to crimes already committed, which is quite different from criminal law as primarily aimed at directing human behavior in the future. Retributive theories are on the right side here. Such theories are to furnish plausible criteria relating crime to punishment. But where are the retributive yardsticks of degrees of criminal intent and/or guilt and seriousness of crime on the one hand, and severity of punishment on the other? How to compare such categorically different quantities, if they may be qualified as quantities at all? Even highly articulate attempts do not seem really convincing here (see for example Von Hirsch, 1993)

Civilized criminal law is reminiscent of retributivism and indeed may bring to light its kernel of truth. In fact, civilized criminal law may be rightly be called retributivism in a more original sense, '*retribuere*' meaning among other things: 'to restore'. Civilized criminal law aims at solving the "yardstick" problem by determining degrees of reparation in terms of harm inflicted on victims in the first place. This may not be simple an straightforward either, still it may be more determinate than other retributivist criteria.

There are at least two basic differences between both retributive and preventive theories on the one hand and civilized criminal law on the other. First, both retribution and prevention are commonly conceived of as essentially produced by offenders' suffering. In civilized criminal law, offenders' suffering is a by-product of reparation and not the essence of punishment. Second, common to preventive and retributive theories is an implicit conception of relationships of subjects and objects in criminal law. With the rise of absolutist conceptions of the state, criminal law and punishment came to constitute the means of reaction of the state toward disobedient citizens, ousting individual victims from criminal procedure (Barnett & Hagel, 1977; see also Barnett, 1998). In civilized criminal law, victims are to return to the official scene, for so long exclusively dominated by the (active) state against (passive) criminal defendants and offenders.

Mediation approaches may not be readily classified in terms of prevention and/or retribution. Mediation is directed to restoration of victims' participation rights, in unofficial mediation and/or before court (Christie, 1977; Christie, 1981). Though

such approaches are not generally intended to completely replace punishment in some form, they still need to be briefly discussed, as they seem to offer at least partial alternatives to civilized criminal law as expounded here.

However important and fruitful such approaches may be, their value may still be limited for at least three reasons. First, not all victims want to encounter offenders (again). Second, questions about what to do in cases of offenders' ill will to mediation may remain unanswered, in the absence of convincing conceptions of material punishment and/or compensation. Third, mediation does not imply clear-cut criteria for symbolical and material end-results satisfying victims' rights. Civilized criminal law, though not at all excluding encounter of victims and offenders in mediation and/or court procedure, relies on material solutions in the first place.

Notwithstanding similarities of civilized criminal law with Braithwaite's conceptions, important differences with his "offender centered" approach are to be noted here. "Reintegrative shaming" plays no role in civilized criminal law. Shame may be too strongly associated with loss of respect and self-respect, whereas civilized criminal law emphasizes expression of positive sentiments and responses furthering such respect and self-respect for victims and offenders. Also, civilized criminal law is "victim-centered" in the first place. According to Braithwaite, reparation relieves offenders' feelings of guilt and alienation that may precipitate further crimes. The effect is said by him to be restorative not only to the victim but also to offenders, increasing their sense of self-esteem and aiding reintegration. Braithwaite may be too optimistic here. In any case, civilized criminal law does not rely on such effects on offenders in the first place (see Braithwaite, 1989; Braithwaite & Pettit, 1990).

3. Resentment and reparation

Impression has it that discussion of principles of criminal law and punishment is not always fruitfully related to psychology. Still, such psychology may clarify important concepts and conceptions relevant for foundations of criminal law and punishment. Indeed, civilized criminal law is related to the psychology of wrongdoing and its consequences for offenders and victims. Concepts of deliberate wrongdoing, resentment, excuse, apology and (symbolical) retribution as reparation are central here. However essential if not even categorical differences may be between informal or even intimate relationships of victims, offenders and their relations on the one hand and highly formalized relationships between criminal offenders, victims and the state representing general interests on the other hand may be, still the same basic concepts determine what is to be done.

An example from everyday life may clarify this. Somebody receives an invitation for dinner at a friend's home. She appears as agreed upon, but nobody opens the door. Later on, the victim expresses some kind of resentment to the offender, who was not there when he ought to have been there. In the absence of convincing excuses, the offender is expected to apologize and to try to make up for the harm he inflicted upon the invited person. Thus he may promise to prepare a still more elaborate dinner, as soon as possible. If to the contrary his reaction to the invited person's resentment were to display complete indifference, then the victim would

feel like not being respected. Then the indifferent offender acts as if he does not take his own conduct seriously, thereby not taking himself seriously either. On the other hand, if the victim does not display any kind of resentment at all, then the offender may think of her as somebody not imposing any limits to the conduct of others towards her. Then she will not be taken seriously either.

Indeed, freedom and resentment are fundamental to human relationships and particularly to acting upon wrong done (Strawson, 1962). It is nearly unimaginable to feel and display no resentment at all at deliberate wrongdoing as distinct from what just happens to go wrong. *Tout comprendre c'est tout pardonner* does not lead to human understanding and sympathy, but to surrender of respect and self-respect for victims and in the end for offenders as well. This holds good not only for more or less intimate human relationships as in the example above, but also for anonymous human relationships making up society as a whole. Hence too its importance for criminal law and punishment.

In the absence of exonerating excuses for wrongdoing, expression of resentment ought to lead to recognition of victims by offenders, apology, reparation and reconciliation, as essential elements of human relationships. Though apology and reparation may be only symbolical, without it there can be no reconciliation and relationships based upon respect and self-respect. This is of basic importance not only for victims, but for offenders as well. Offenders will not be respected by victims and others as long as they do not take responsibility for their conduct and its consequences. Thus both resentment and eventual reparation and reconciliation between offenders, victims and others in society are essential for reciprocal respect and self-respect, probably the most important immaterial values in life (Rawls, 1971).

Personal resentment of victims is complemented by moral resentment of others and society as a whole against offenders. Solidarity presupposes such moral resentment about harm done to others, as a kind of compassion essential for community. Moral resentment is to supplement personal resentment in bringing offenders to repair their wrongdoing. This holds good not only for personal relationships, but also for moral resentment expressed in the civil solidarity of civilized criminal law, assisting victims who cannot and indeed legally may not seek reparation by themselves. Moral resentment may even be regarded as a form of love, as solidarity in reciprocal self-realization. (George Sand wrote about wrongdoing: "Humanity is outraged in me and with me. We must not dissimulate nor try to forget this indignation which is one of the most passionate forms of love." [see Mason ed., 1955; p. 166]).

Current criminal law and punishment at best is seriously distorted realization of relationships of crime, resentment and reparation. Punishment as suffering for its own sake is expression of resentment emphasized beyond recognition, leaving out of account the core conceptions of reparation and reconciliation with victims and society. Punishment as meting out mere suffering, for preventive and/or retributive purposes, seems to be no more than painfully driving home the message that wrong is done. Essential consequences of wrongdoing and resentment are fatally left out of account, then. Nothing much more than irreversible and often lifelong consequences for the convicted and not much good for victims is the result. Expression of resentment ought to be no more than an intermediate stage in restoration of human relationships for victims and offenders.

4. Principles of civilized criminal law

Civilized criminal law answers to crime are to conform to the basic scheme of resentment and recognition, leading to compensation and reparation for victims. Moral resentment comes to the fore, then. The state, representing and realizing the public interest, acts on behalf of personal resentment of victims and of moral resentment of other citizens, in order to force offenders to compensate for harm done to victims.

Still there are basic differences with reparation of harm outside the law. First, prohibition of taking the law into one's own hands is of course essential. The state is to intervene, though some offenders may voluntarily answer to victims' resentment and offer adequate reparation outside official procedures. Second, apology and reparation as feasible in personal relationships are to be replaced by some or other anonymous form of reparation. In personal relationships, apologies and reparation may assume different symbolical, physical and material forms (for example in preparing a still better dinner). In criminal procedure, the only generally available form of material reparation is transfer of money from victims to offenders, as nothing else of symbolical and/or material value between anonymous victims and offenders is available (apart from return of stolen goods and the like). Third, it goes without saying that formalized methods of investigation, proof and determining measures of punishment replace informal proceedings.

Civilized criminal law makes offenders and nobody else repair the consequences of crime, by payment to victims and to the state. This may amount to no more than payment of more or less substantial sums of money and/or other kinds of material compensation. But serious crime is to be compensated for by penal servitude, the rewards of which are due to victims and to the state. Such penal servitude does not exclude additional payment by offenders. Five main points may further clarify this.

First, harm to be compensated for is not only material loss, but also bodily, mental and emotional harm to victims and/or their relations and harm to general interests. Also, offenders are to pay for costs of investigation, prosecution and execution. Harm may be done exclusively to general interests as well, for example by tax fraud or by risky behavior like carrying firearms, but also through fear that the same kind of crime will happen again. Though such harm may lead to no more than marginal personal resentment for all threatened citizens, it is still to be compensated for. Such general personal resentment is to be distinguished from moral resentment as solidarity with victims. Such moral resentment is more important in cases of serious crime against specific victims than in cases of more or less petty crimes against public or other general interests.

Second, civilized criminal law sentences may not always be very different from civil law rulings determining amounts of damages. Still, criminal damages or fines to be paid to victims and the state may be rather higher, as more harm is to be repaired by criminal offenders than is to be compensated for under the law of torts. Such fines may resemble punitive damages in tort law.

In cases of serious harm, punishment as reparation ought to be more than paying punitive damages. Even though such damages may be much higher than would be needed for compensation of material harm, compensation and reparation of

resentment and related mental and emotional harm may necessitate offenders' labor in service of victims, as more than just material compensation. Penal servitude is to forcibly express the necessity of payment by offenders themselves. Such retributive payment is created by offenders' own action, then, instead of consisting of money more or less accidentally available to offenders. Also, penal servitude may be regarded as material and symbolical undoing of crime by perpetrators of crime themselves.

Penal servitude may have an air of traditionalist retributivism. However, the important difference is the constructive, compensatory and reparative nature of penal servitude. Moreover, such penal servitude is to be prescribed only in reparation of serious harm and related personal and moral resentment. Also, penal servitude may only be prescribed by a specific criminal code and may not just depend on general criteria of tort. Whatever blurring there may be between civil law and civilized criminal law, principles of legality have pride of place here. In such a code, crimes such as murder, rape and serious maltreatment may indeed be punished by long-term penal servitude. With few exceptions, such crimes have lifelong consequences for victims. Though such harm cannot really be compensated for, penal servitude may offer at least some reparation of resentment and compensation of loss.

Penal servitude may be performed in relative freedom, but in serious cases isolation from society is not to be excluded. In such cases, special and general preventive force may be an added advantage indeed. Cruel and inhuman as such penal servitude may seem, it may well contrast favorably with "mere" imprisonment, even for offenders. Also, offenders may perform penal servitude in all kinds of jobs, including skilled professions.

Third, absence of guilt and/or circumstances exonerating criminal conduct exclude penal servitude, as there can be no resentment to be repaired in such cases. Still there may be serious harm done. Such harm may be compensated for by offenders' insurance. Vague boundaries between civil law and criminal law are apposite here too. Also, public funds paid for by offenders may be instituted for damages not covered by offenders' direct payments and/or insurance money. Indeed, such public funds may be financed by all guilty offenders, as (a small) part of their reparative action and related to the seriousness of their crimes. (This apart from the possibility of public funds intervening in all cases of reparation of criminal harm, again paid for by offenders: § 6).

Fourth, in many cases civilized criminal procedure may not be unlike civil procedure initiated by victims acting as plaintiffs. However, crimes against exclusively public interests, serious crime in general and/or crime not brought to light without police and public prosecution action may still be covered by criminal investigation and procedure initiated by the public prosecution. Also, the public and institutional character of criminal trial by the state may serve to symbolically express moral resentment of the community on behalf of victims.

Fifth, civilized criminal law does not exclude mere imprisonment and other forceful measures against offenders. Thus the threat of imprisonment as such may be indispensable as *ultimum remedium*, even in civilized criminal law, if offenders are unwilling to cooperate in reparation by payment and/or penal servitude. Also, overriding needs for special prevention may still necessitate isolation by imprisonment.

5. Solidarity with victims and offenders

Civilized criminal law is not just solidarity with victims, but also with offenders. Penal servitude is more than backward-looking retribution by offenders' suffering. It is first and foremost about reconstitution of community. Penal servitude is offenders' symbolical and material return to socially acceptable relationships with victims and citizens in general. Penal servitude is community service. This holds good for other civilized criminal sanctions as well. Here, again, the meaning of resentment and reparation for a viable society is most important. Differences with abolitionist and mediation approaches are readily apparent. Solidarity with offenders does not imply letting them go free, before or after mediation.

Such solidarity with victims and offenders contrasts with anonymous prevention and retribution in punishment predicated upon all-too abstract relationships between offenders and the state. Imprisonment is an expression of the meaninglessness of exclusion or even of instrumentally preventive use of offenders to so-called social goals that may actually be effectively thwarted that way. Imprisonment as idle isolation does not improve offenders. Also, penal servitude as meaningful work may have better resocializing effects than psychotherapies performed upon - again passive - offenders (see also Szasz, 1977).

Civilized criminal law may also offer rational and determinate criteria of punishment. Though relationships of harm and offenders' guilt on the one hand and retribution as compensation on the other may not always be simple and straightforward, the basic principle is clear. Retribution for intentional or guilty offenders is to be meted out according to harm done in the first place. Also, harm to be compensated for in civilized criminal law does not include any self-inflicted harm and/or harm experienced as a consequence of condemnation of conduct of others judged to be immoral or obscene. Compensation in civilized criminal law of self-inflicted harm is already excluded by the necessary relationship of resentment with harmful conduct of others. Resentment cannot be related to self-regarding conduct. Thus, for example, civilized criminal law does not cover drug abuse by itself.

Current criminal law practice offers limited possibilities for victims to obtain material compensation. Though punishment as merely meting out suffering may have symbolical reparative meaning, tort law is to be appealed to in order to obtain damages. But tort law damages may be difficult or even impossible to obtain in more than a few cases. For example: in many legal orders, relatives may not obtain damages for harm done to them by murder or manslaughter, unless they depended on the victim for their living. In civilized criminal law, damages are integrated into retribution as restitution. Also, victims' harm is more adequately compensated for than may be the case in tort law. As a consequence, no separate civil lawsuits to obtain damages are necessary apart from criminal procedure.

In current criminal law practice victims are often not even informed about proceedings against offenders. Though civilized criminal law does not necessarily imply active roles of victims as plaintiffs or otherwise in criminal procedure, it may still be good for victims to be allowed to appear in court if they wish. At least victims may be allotted the right to state the facts of their cases, even if their

testimonies are deemed to be unnecessary for proof against defendants.

Lastly, as noted before, prevention has no pride of place in civilized criminal law. But it is not lost in it either, even apart from preventive effects of imprisonment in serious cases. Remember that the additional cost of criminal procedure and penal servitude is too high a price of crime to be willingly paid by prudential offenders.

6. *Objections*

A basic objection to civilized criminal law as expression and realization of resentment and reparation is based upon the absence of pre-existing personal relationships between most offenders and victims. Recovery of respect and self-respect by expression of resentment and subsequent expression of guilt and reparation seems meaningful only between victims and offenders already having positive bonds. Also, most victims are unlikely to have any interest in establishing or continuing relationships with offenders. In the absence of such relationships, there seems to be nothing to be restored and no sense in reconciliation of victims and offenders.

This objection may be answered in part by stressing, again, that civilized criminal law does not imply mediation, though it does not exclude such mediation either. If victims are unwilling to encounter offenders, there still remains compensation to be paid, not only to individual victims but also to the state, representing the other members of society and their moral resentment. Nor does civilized criminal law imply that criminal prosecution may be effected only if victims wish so. Even if there would be no personal resentment and only suffering for victims, there still is moral resentment to be repaired by offenders.

Absence of personal relationships between victims and offenders is characteristic of crimes against institutions too. Think here of theft of a carton of milk from a supermarket owned by a large investment group. There is not much room for personal resentment then, as there are no specific victims experiencing any sizeable harm. Here the weight comes down on moral resentment against theft in general, be it from the poor or from the rich.

Probably the best-known objection to any conception of reparative criminal justice is the "price list problem". Criminal law ought to be more than indication and prediction of prices probably to be paid for crime (Watson et al., 1989; Zedner, 1994; pp. 229, 239; Wright, 1996). There ought to be at least *pouvoir symbolique de condamnation*, which is absent in principle in tort law (Van de Kerchove, 1987). However, such prices may be quite high in civilized criminal law. The cost of criminal prosecution is added to the price to be paid by offenders and punishment may indeed include penal servitude and attendant suffering for offenders, still further elevating "the price of crime" above any prudential level, that is, from the standpoint of potential offenders. Civilized criminal law aims at integration of compensation and retribution.

Against compensation by offenders' payment it may be also objected that transfer of money cannot be the end of things in criminal justice. Criminal justice cannot be just another kind of capitalism. However, no other kinds of material compensation are available in most cases. Also, remember that civilized criminal law is no crimes' price list and that penal servitude certainly goes much further than just transfer of

money.

Determination of measures of punishment may still pose difficult problems. What is adequate penal servitude for murder and manslaughter? Is not life priceless and harm done by killing immeasurable? Ought not such crimes to lead to penal servitude for life, to the most severe punishment possible in civilized criminal law? Such questions, not adequately answered in current retributive and/or preventive theories either, must in the end be left to the reasoned discretion of the legislature and the courts. This may hold good for measures of punishment for many kinds of lesser crime as well. Of course, tort law is plagued by the same problems: what is just compensation for bodily and/or mental and emotional harm?

Lastly, civilized criminal law brings to light vexing problems in relationships between criminal justice and social justice in general. Shifting emphasis to reparation implies increasing reliance upon financial transfer from offenders to victims. That is: from the rich to the poor, but from the poor to the rich as well. Unfortunately, money is indispensable here too, as other kinds of material reparation will do in special cases only, as with restitution of stolen goods.

Thus offences like common assault without lasting physical consequences and committed without criminal intent may be punished by a fine to be paid to victims. But such a fine may mean nothing to the rich, be they offenders or victims. As offenders, they may gladly pay such a relatively small fine, as victims they may not have any feeling of being adequately compensated. Poor victims may really be compensated, as little money may mean much to them. But poor offenders may inordinately suffer by paying even a small fine. All of which does not really add up to justice, criminal or otherwise.

However, such arguments hold good only against punishment as purely financial compensation. First, serious criminal intent or guilt may lead to penal servitude, which hits the rich as hard as it does the poor. Also, harm done to institutional and corporate victims, whether caused by petty shoplifting or large scale tax fraud, may still be punished by penal servitude. There may be little personal resentment to be repaired in such cases, but still there is moral resentment of third parties as a basis for such penal servitude.

Second, criminal justice as a part of public justice may in principle imply systems of fines along the lines of fiscal systems taxing richer offenders proportionally higher. Public funds for covering the costs of crime may be financed more by rich offenders than by the poor. Thus corporate crime may be fined not only according to harm, but also according to corporations' wealth. This is not to imply that victims of rich offenders are to be better off than victims of the poor. The surplus of fines paid by the rich may still go to public funds covering the costs of crime. Here and elsewhere it is clear that no theory of criminal justice may be expected to be plausible without recourse to more general conceptions of social justice (see also Braithwaite & Pettit, 1990).

Another advantage of public funds covering the costs of crime may consist in avoidance of direct relationships between victims and offenders. As noted before, not all victims of crime may want any more relationships of whatever kind with offenders. Public funds may act as "buffers", also expressing public solidarity with victims, as the state pays to victims for the costs of crime, then.

Apart from problems in principle, civilized criminal law of course faces legal and other practical problems as well. Thus it has been contended that penal servitude is

incompatible with (international) legal prohibition of penal servitude, which is taken to come down to slavery. If as far as this is a problem at all, it may be countered by offering imprisonment as a (fully legal) alternative. Penal servitude presupposes availability of paid labor as well, both in society and from offenders. Also, care must be taken to avoid undue influence of emotions aroused by victims upon judicial authorities charged with determination of proof and amounts of retribution. However, such practical problems do not appear to be more serious than problems in current criminal law practice.

7. A civilized criminal law agenda: "Nichts ist praktischer als eine gute Theorie"

A paradigm shift is needed in criminal law theory and practice. (Though civilized criminal law is not completely new, of course: think of tort-based criminal law in Roman times and comparable practices in non-western cultures still effective today.) In principle, civilized criminal law would be best realized by drafting and enforcing civilized criminal codes. But this is not to be expected within any near future, in any contemporary legal order. Compounding problems here is the need for redefinition of relationships between civil and criminal material and procedural law, though such relationships are of course far from unproblematic in actual legal theory and practice either.

United Nations, European and national rulings serving victims' right point in right directions here, but do not nearly go far enough, accepting as they do core elements of the actual administration of criminal justice. As long as the essence of punishment is equal to making offenders (and more than a few innocent convicts) suffer, victims' rights cannot be really served by retribution in its real sense.

However, the relatively "open" patchwork of current criminal law and criminal procedure may offer serious possibilities for gradual improvement in civilized directions. To begin with, mediation may do in some cases, though it should be emphasized again that civilized criminal law is not to be equated with it. Negotiation between victims and offenders may not invariably lead to acceptable outcomes, but damages may be more easily paid if offenders face less attractive alternatives of prosecution and likely punishment. Mediation may even be initiated by the police and the public prosecution.

If there is to be criminal prosecution, then it ought to be determined as much as possible by principles and goals of civilized criminal law. Within the bounds of political and institutional possibilities, the public prosecution may decline to bring before court any offences not having clear-cut relationships with actual or possible harm to victims. Again, this may imply low priorities for prosecution of drugs trafficking, in favor of prosecution of serious crime like traffic in women.

In some legal orders, victims may sue for damages within criminal procedure. This may be further promoted, given limited possibilities for victims of crime to obtain damages in civil lawsuits. Criminal procedures may also offer possibilities like suspended sentences on condition of paying damages.

If nothing else can be done, degrees of punishment within criminal procedure as it is now ought to be at least partially determined by reparative considerations. If personal resentment of victims and moral resentment of other citizens concerned may be repaired by punishment like paying fines to the state only and mere

imprisonment, so be it. Though such measures are at odds with civilized criminal law, they may still be the things to do, given practical limitations and necessities of prevention. Still, unpaid labor for the public good and related measures already possible in current legal orders will in many cases be better approximations to reparative justice in civilized criminal law. This holds good in cases of crimes causing harm to general interests anyway. Indeed, some of this is waning in more than a few legal orders (Zedner, 1994).

Lastly, some suggestions may make sense in current civil law too. Compensation for immaterial harm may be awarded to victims of crime under tort law. Also, civil courts may order preventive measures and default fines. Even punitive damages may do some good, at least from the perspective of reparation and even prevention of crime. Still, such latitudes in contemporary legal orders to be exploited for civilized criminal law purposes should not blur sight on necessities of legislative reform.

To conclude: the most important of it all may be citizens' and before all officials' active consciousness of criminal justice as reparation for victims. It has been said that there are almost as many conceptions of criminal law and punishment as there are criminal law officials (and citizens). Nobody seems to really agree, everybody seems to think and act as if all others are wrong. Patchworks or worse are the result. Current criminal law practice may well be one more "prison we choose to live inside" (Lessing, 1986). It is time for deliberation and liberation, not only for victims of crime and for offenders. There can be no criminal justice without effective attention to victims' rights. Important here are officials' effective attitudes, to be oriented toward realization of victims' rights as the primary motive in their profession.

To conclude: more often than not: such reorientation toward criminal justice for victims has been seriously hindered by ever more punitive public opinions and attendant politics, decrying and despising "soft" mediation and other varieties of victim-oriented criminal justice regarded as "letting offenders go free". One last important advantage of retribution as reparation by offenders may be its clearly punitive consequences. As soon as this is clearly seen, and seen to be practiced, serving victims' rights may be all the more acceptable to public opinion and thus to politics. Anyway, and again, politics' and government first duty for now of course is reform of the administration of criminal justice, by legislation, however piecemeal, informed both by international rulings and principled insight in retribution as reparation. The government and all bodies of public administration in Poland and elsewhere may be wished all kinds of success in this most important enterprise.

References

- Barnett, R.E. (1998). *The structure of liberty: justice and the rule of law*. Clarendon Press; Oxford & New York.
- Barnett & Hagel, J. eds. (1977). *Assessing the Criminal: Restitution, Retribution, and the Legal Process*. Ballinger Publishing Company; Cambridge, Mass.
- Braithwaite, J. (1989). *Crime, Shame and Reintegration*. Cambridge University Press; Cambridge.
- Braithwaite & Pettit, P. (1990). *Not Just Deserts: A Republican Theory of Criminal Justice*. Clarendon Press; Oxford & New York.
- Christie, N. (1977). Conflicts as Property. In *The British Journal Of Criminology*. Vol. 17 No. 1.

- Christie (1981). *Limits to Pain*. Martin Robertson; Oxford.
- Hirsch, A. von (1993). *Censure and Sanctions*. Oxford University Press, Oxford.
- Kerchove, M. van de (1987). *Le droit sans peines: aspects de la dépenalisation en Belgique et aux Etats Unis*. Facultés Universitaires Saint-Louis; Bruxelles.
- Lacey, N. (1988). *State punishment: political principles and community values*. Routledge; London.
- Lessing, D. (1986) *Prisons We Choose To Live Inside*. CBC Enterprises; Toronto, Jonathan Cape; London.
- Mason, J. ed. (1955). *The Family of Man*. Maco; New York.
- Murphy, J.G. (1992). Legal Philosophy. In *Encyclopedia of Ethics* (Becker, L.C. & Becker, C.B. ed.). Garland Publishing, Inc.; New York & London.
- Rawls, J. (1971). *A Theory of Justice*. Belknap Press of Harvard University Press.
- Szasz, T.S. (1977). Psychiatric Diversion in the Criminal Justice System: A Critique. In *Assessing the Criminal* (Barnett & Hagel eds.).
- Strawson, P.F. (1962). Freedom and resentment. In *Proceedings of the British Academy*. Also in *Freedom and resentment, and other essays* (Strawson) (1973). Methuen; London.
- Ten, C.L. (1989). *Crime, guilt, and punishment: a philosophical introduction*. Clarendon Press; Oxford.
- Watson, D., et al. (1989). Reparation for retributivists. In *Mediation and Criminal Justice: Victims, Offenders and Community* (Wright, M. & Galaway, B. ed.). Sage Publications; London, Newbury Park & New Delhi.
- Wright, M. (1996). *Justice for Victims and Offenders: a restorative response to crime*. Open University Press, Milton Keynes & Philadelphia.
- Zedner, L. (1994). Reparation and Retribution: Are They Reconcilable? In *The Modern Law Review*, 57.